IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1624 OF 2004

Bharat @ Velji Govindji
Panchal @ Lohar ...Petitioner.
Versus
The State of Maharashtra
and Ors. ...Respondents.

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Mrs.Smita Rajendra Kadu, Advocate for the Petitioner.
Smt.A.S.Pai, A.P.P. for the State.

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WITH
CRIMINAL WRIT PETITION NO.3019 OF 2005

Shri.Sayaji Ananda Nagare ...Petitioner
Versus
The State of Maharashtra
and Ors. ...Respondents.

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Mrs.Smita R. Kadu, Advocate for the Petitioner.
Mr.V.B.Konde-Deshmukh, APP for the State.

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WITH
CRIMINAL WRIT PETITION NO.375 OF 2006

Mr.Vaman Dev Khandavi ...Petitioner.
Versus
The State of Maharashtra
and Ors. ...Respondents.

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Mrs.Smita Rajendra Kadu, Advocate for the Petitioner.
Smt.A.S.Pai, A.P.P. for the State.

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CORAM : D.G.DESHPANDE AND
SMT.V.K.TAHILRAMANI,JJ.

DATE OF RESERVING : MAY 02, 2006.

DATE OF PRONOUNCEMENT: JUNE 28, 2006.

ORAL ORDER (PER SMT.V.K.TAHILRAMANI,J.)

. Rule. By consent, Rule made returnable forthwith.

2. In all these Petitions, the petitioners who are prisoners had preferred applications for furlough leave. The said applications came to be rejected on account of overstay of the petitioners when they were earlier released on parole or furlough.

3. As the issue involved in all these matters is the same, all these petitions are being decided by a common order.

4. The petitioner in Writ Petition No.1624 of 2004 was released on parole. Thereafter, he absconded for 5420 days. The petitioner came to be arrested by the Police and brought back to prison. The family of the petitioner is residing in Rajasthan State and the petitioner wanted to spend the period of furlough at Rajasthan. It is the case of the petitioner that when the petitioner was released on parole, he was about to

surrender, however, he suffered a serious head injury. On account of head injury, he was required to take treatment; and it is on account of this, that he did not surrender in time. The application of the petitioner for furlough came to be rejected as there was adverse police report from the District Magistrate, Waswada, Rajasthan. Moreover on the earlier occasion when he was released on parole, he did not report back in time. His application for furlough also came to be rejected on the ground that there was no person ready to stand as surety for him.

5. The application for furlough of the petitioner in Writ Petition No.3019 of 2005 came to be rejected on account of adverse police report. The ground on which the application for furlough came to be rejected was that when the petitioner was released on parole leave, he overstayed 56 days and hence he is disqualified as per Rule 4 (10) of the Maharashtra Prisons Act. In this case, after 56 days, the petitioner himself surrendered back to the jail authorities. It is the case of the petitioner that he was granted parole leave for 30 days. He applied for

extension of further 30 days on account of illness of his mother, which came to be granted. Thereafter, he again made an application alongwith medical certificate for further extension of parole. However, he did not receive any reply. As he did not receive any reply, after 56 days he surrendered back to prison.

6. The application for furlough of the petitioner in Writ Petition No.375 of 2006 came to be rejected on the ground that when he was earlier released on furlough, he had quarrelled with the witnesses and other people. So there was apprehension that if he was again released on furlough, he would indulge in similar acts. The application was rejected on one more ground i.e. when the petitioner was earlier released, he overstayed for 721 days and finally the police traced him and brought him back to prison.

7. Grant and refusal of furlough is covered by the Prisons (Bombay Furlough and Parole) Rules, 1959, which have been framed under the Prisons Act, 1894. The said Rules are statutory Rules. Rule 4 of the Prisons (Bombay Furlough and Parole)

Rules, 1959 reads as under :

4. The following categories of prisoners shall not be considered for release on furlough :-

(1) Habitual prisoners.

(2) Prisoners convicted of offences under sections 392 to 402 (both inclusive) of the Indian Penal Code.

(3) Prisoners convicted of offences under the Bombay Prohibition Act, 1949.

(4) Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquillity.

(5) Prisoners who, in the opinion of the Superintendent of Prison show a tendency towards crime.

(6) Prisoners whose conduct is, in the opinion of the Superintendent of the Prison, not satisfactory enough.

(7) Prisoners confined in the Ratnagiri Special Prison, (other than prisoners transferred to that prison for Jail services.)

(8) Prisoners convicted of offences of violence against person or property committed for political motives, unless the prior consent of the State Government to such release is

> obtained.
>
> (9) A prisoner or class of prisoners in whose case the State Government has directed that the prisoner shall not be released or that the case should be referred to it for orders.
>
> (10) Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough."

. Thus, it is seen that Rule 4(10), reproduced above, deals with a situation with which we are concerned. All the petitioners have overstayed the period for which they were granted parole or furlough. None of them have surrendered back to the prison in time. Rule 4(10) specifically deals with such cases and states that not surrendering back in time would render the prisoner ineligible for grant of furlough or parole.

8. The learned Advocates for the petitioners submitted that furlough is a right which is given to the prisoner and hence, the application for furlough of the petitioners could not be rejected. It is submitted that the object behind grant of

furlough ought to be considered. Furlough is granted to a prisoner so that he can meet his family members and get a chance to mix with the society and thus lead a normal life for a short period. It was felt that this would help to reform the prisoner.

9. As far as Rules relating to furlough are concerned, Rule 17 of the Prisons (Bombay Furlough and Parole) Rules, 1959 relating to grant of furlough states that:

> 17. "Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough."

. The learned Advocate for Petitioners submitted that keeping the object behind grant of furlough in mind, there are some decisions which hold that a prisoner has the right to be released on furlough. In support of the contention that furlough is a substantial and legal right of the prisoner notwithstanding Rule 17, reliance is placed on some earlier decisions of the Division Bench of this Court. The said decisions are in the case of **Sharad Keshav Mehta Vs. State of Maharashtra and Ors.,** reported in **1989 Cr.L.J.**

681 and **Sharad Bhiku Marchande Vs. State of Maharashtra and Ors.,** reported in **1991 Cr.L.J. 2109**. It is also pointed out that in two unreported decisions of the Division Bench of this Court in the case of **Anil Mane Vs. State of Maharashtra & Ors.,** and **Anil Kale Vs. State of Maharashtra & Ors.;** and two unreported decisions of a Single Judge of this Court in the case of **Mohammed Harun Ansari Vs. State of Maharashtra and Ors.** and **Ashok Chopde Vs. State of Maharashtra and Ors.**, it has been held that furlough is a valuable right of the prisoner. The decision in the case of **Anil Mane** was rendered on 26th March, 1998 in Cr.W.P.No.186 of 1998. The decision in the case of **Anil Kale** was rendered on 25th June, 2001 in Cr.W.P.No.797 of 2001. The decision in the case of **Mohammed Ansari** was rendered on 31st March, 2000 in Cr.W.P.No.629 of 2000 and the decision in the case of **Anil Chopde** was rendered on 4th April, 2000 in Cr.W.P. No.557 of 2000. It was stated that there were other decisions also which took the similar view that furlough is a valuable right of the prisoner. The decision first in point of time which takes the view that furlough is a right of the prisoner and

inspite of Rule 17 a prisoner cannot be denied the right was taken in the case of **Sharad Mehta Vs. State of Maharashtra & Ors.**(Supra).

10. We have carefully perused the decision in the case of **Sharad Mehta**. The said case was not a case wherein the prisoner had absconded and that furlough was refused on that ground. In the said case it was urged on behalf of the State that Rule 17 prescribes that the right to be released on furlough is not a legal right conferred on the prisoner and, therefore, even if a prisoner satisfies all the conditions relating to furlough, the Government is not bound to release the prisoner on furlough. In the said case the application for furlough came to be rejected on the ground that there was adverse police report. It was urged by the prosecution that the Commissioner of Police, Pune had informed the jailor that in case the prisoner is released on furlough then there is likelihood of disturbance of peace and therefore furlough cannot be recommended. However, on a query being put by the Court as to what was the material before the Commissioner of Police to come to that conclusion,

no material could be pointed out to the Court. The Division Bench hence observed that unless the Commissioner of Police had material from which a reasonable inference can be drawn, the right to release on furlough cannot be deprived by resorting to Rule 4. In the said case, the prisoner was convicted for committing murder of his wife and hence the Court was unable to fathom as to how the release of such a prisoner is likely to disturb public peace and tranquillity. The Court further observed in the said Case that, as the State Government has failed to point out any material to indicate that the release of the prisoner on furlough would disturb public peace and tranquillity the rejection of the application is misconceived. The decision in the case of Sharad Mehta does not say that if the police report is based on cogent and concrete material and there are serious and strong circumstances backed by material for refusal of furlough, then also furlough should be granted to the prisoner.

11. On a plain reading of the decision in the case of Sharad Mehta (Supra), it is seen that had there been material from which a reasonable

inference could be drawn that the release of a prisoner would affect public peace and tranquillity, the Court would not have interfered if the prisoner would have been deprived of his right to be released on furlough. From this decision, it is clear that furlough can be refused to a prisoner under Rule 4, provided that there is some material from which a reasonable inference can be drawn that the prisoner is covered by any of the ten categories under Rule 4.

12. As far as the decision in the case of **Sharad Bhiku Marchande** (supra) is concerned, the issue therein was whether a prisoner whose appeal is pending before the Court, can be released on furlough. In the said case, the Division Bench held in Para-8 that if the prisoner satisfies the conditions laid down in the Furlough Rules, then, the prisoner has a legal right to seek furlough. It was in this context that it was held that a prisoner is entitled to exercise the right for furlough in accordance with the Rules and the appropriate authority has to consider the furlough application in accordance with the Rules of Furlough notwithstanding the fact that the

criminal appeal of the prisoner is pending in a Court of law. It was further held that a prisoner has got a substantial and a legal right to apply for furlough and on such application being preferred, the authority must consider the said application on merits and pass appropriate orders. Thus, as this decision does not deal with a case falling under Rule 10, it would be inapplicable to the present case.

13. As far as the four other decisions are concerned, in all these decisions it has been held that furlough is a valuable right available to the prisoner. In all these cases, furlough came to be rejected mainly on the ground of adverse police report. However, no cogent material could be pointed out in support of the adverse police report. Hence the Court was of the opinion that the report was not based on any cogent or reliable material, therefore the Court declined to take it into consideration.

14. The first decision in which it has been held that furlough is a right which is granted to the prisoner is in the case of **Sharad Mehta**

(Supra). In the said decision in para-2 it has been observed as under:

> "In our judgment, the State Government has framed rules in exercise of the powers conferred by cls.(5) and (28) of S.59 of the Prisons Act, 1894 and on framing of such rules, R. 17 cannot deprive the prisoner of the right to be released on furlough. In spite of the enactment of R.17, we hold that the right to be released on furlough is a substantial and legal right conferred on the prisoner."

. All subsequent decisions are based on the decision in the case of Sharad Mehta.

15. The decision in the case of Sharad Mehta will have to be read and appreciated in its totality. It does not hold that in each and every case whatever the circumstances may be a prisoner has to be released on furlough. In fact, this decision also provides for cases wherein furlough can be rejected by the authorities. In this decision it is also made clear that a prisoner cannot claim, as of right, to be released on furlough without complying with the requirement of the Rules. It is further observed in Para-4 as

under :

> "It hardly requires to be stated that the prisoner cannot claim as of right to be released on furlough without complying with the requirements of the rules framed for release of prisoner on furlough."

. Thus, this decision too does not lay down that a prisoner is entitled to be released on furlough irrespective of any circumstances contraindicating the grant thereof.

16. The learned Advocate for the petitioners further submitted that though the prisoners had overstayed on earlier occasions when they were released on parole or furlough, however, they have been punished by imposing prison punishment on them like forfeiture of remission, as provided in the Rules framed under the Prisons Act. It is submitted that once the prisoners have been punished for overstay, they could not be punished again by refusing furlough leave. In support of this submission, reliance is placed on the decision of this Court in the case of **Santosh Bhagwandin Bachharaj Vs. Superintendent, Central Prison, Amravati,** reported in **2003(4) Mh.L.J. 349** and on another decision in the case of **Sarfuddin**

Aminuddin Vs. State of Maharashtra and Ors., reported in **2003(4) Mh.L.J. 491**. Both these decisions have been rendered by the same Single Judge of this Court. In both these decisions, it has been held that prisoners as of right are entitled to furlough leave on furnishing an appropriate and competent surety. In these decisions it is further held that due furlough application of a prisoner who has surrendered late in the past, cannot be rejected especially when punishment has been imposed on him as per the Rules by way of deducting remission.

17. We have carefully considered the above decisions. From the scheme of the Rules, it is quite evident that non-release on furlough is not a punishment but it is an automatic consequence of operation of R.4(10) and the prisoner is not entitled to furlough because he has breached conditions relating to parole or furlough when earlier released. Rejection of an application for furlough cannot be said to be a punishment awarded by the jail authorities, in our considered view.

18. If a prisoner had already been punished by

way of cutting of remission or any other prison punishment for not surrendering back in time, it cannot be claimed by the prisoner that he has a right to be released on furlough in spite of his record which shows that he had indulged in outright abuse of this right. When a prisoner has not surrendered back in time and specially where the prisoner has to be arrested by the Police and brought back to prison, the prisoner cannot claim that the concerned authorities would not be justified in their apprehension that if such a prisoner is again released on furlough or parole, he is again likely to abscond. Imposition of prison punishment on a prisoner for not surrendering back in time after his release on parole or furlough is a separate and independent issue than the grant or refusal of furlough leave.

19. If the concerned authorities cite this Rule i.e. 4(10) for rejecting the application for furlough, it cannot be said that it amounts to inflicting punishment on a prisoner. Rule of double jeopardy has no application in the present cases as refusal of furlough on the grounds envisaged in Rule 4(10) is a circumstance or

condition provided for in Rule 4 so as to refuse furlough leave. A prisoner to whom furlough leave is refused under Rule 4(10) cannot claim that it amounts to inflicting punishment on him in respect of a circumstance or event for which he has already been punished under the Rules.

20. To appreciate the gravity of the issue, we had called upon the learned APP to provide the statistics in relation to prisoners who had not surrendered back in time. The said statistics are as under :

Year	Total number of prisoners	Number of prisoners released on furlough	Number of prisoners released on parole	Number of prisoners released on furlough absconded	Number of prisoners released on parole absconded
1.	2.	3.	4.	5.	6.
2000-01	6310	1383	388	23	9
2001-02	6684	1422	382	23	3
2002-03	7219	1458	474	37	9
2003-04	8151	1429	534	29	18
2004-05	8613	1611	596	35	23

. Concerted efforts have been made by all authorities, especially the Police, to trace these absconding prisoners and to bring them back to prison. Various steps have been taken to trace them including searching at their residential houses and other places where those prisoners are usually found. In a number of cases, action has been taken against the sureties. After deploying a lot of man power and after spending a lot of time, energy and money, some of the prisoners have been traced by the Police and brought back to prison. Many of the prisoners who absconded were from rural areas, hence police had to travel long distances in order to trace these prisoners.

21. Thereafter, on behalf of the applicants reliance was placed on a decision of the Full Bench of the Gujarat High Court in the case of **Bhikhabhai Devshi Vs. State of Gujarat & Ors.**, reported in **1987 Cri.L.J.1932 = AIR 1987 Gujarat 136.** It was submitted that after considering various judgments, the Full Bench of the Gujarat High Court held that Rule 4(10) cannot be read as a total automatic prohibition to grant of furlough

to a defaulting and punished prisoner. However, it is pertinent to note that in the very same decision it is further held as under :

> . "As far as the first part of Rule 4(10) is concerned in respect of prisoners who have escaped or attempted to escape, such prisoners, a class by themselves, cannot be trusted for being released on furlough and, therefore, in such cases the prison authority would be justified in not considering their request for furlough. However, in cases of late surrender, where there is no element of escape, but merely there is a delay in surrendering, the question will have to be examined on the facts and circumstances and merits of each case. A given case of prisoner defaulting in timely surrender, who is wanted by the jail authorities and who is not available at the place where ordinarily he should be and who is apprehended by the police or who surrenders because of the chase by the authority, may fall under the first part where he cannot be trusted to be released on furlough again.

. It is further observed that since furlough is to be granted for no particular reason, it can be denied in the interest of society and a prisoner cannot be released on furlough irrespective of past conduct and performance.

. Lastly it was observed therein that

furlough is a right and privilege admissible and regulated under the rules and it can be granted; refused or withdrawn as per rules.

22. Rule 4(10) of Prisons (Bombay Furlough and Parole) Rules, 1959, specifically provides that if a prisoner does not report back in time, he shall not be considered for release on furlough. Besides Rule 4(10), there are also other Rules which set out when a prisoner cannot be released on furlough. We find that the Rules are reasonable and a reasonable restriction has been imposed on the grant of furlough or parole to prisoners who have absconded. However, in our opinion, Rule 4(10) cannot be construed as mandatory making prisoners automatically disqualified and ineligible for furlough in all cases of late surrender. Thus, R.4(10) cannot be read as a total and automatic prohibition on granting furlough to a defaulting and punished prisoner. In view of the aforesaid discussion, it is clear that in the context of latter part of R.4(10) the word "shall" will have to be read as "may" and directory. The prison authorities cannot automatically reject as ineligible the

request of due furlough of the prisoners who have surrendered late in past. The authorities have the power and duty to consider grant or refusal of such furlough due to the prisoners, having regard to the facts and circumstances of the case including the fact that the prisoner had surrendered late in past. These would be some of the relevant factors to be taken into account.

23. If at all there is threat to the witnesses if a prisoner is to be released on furlough the safety of the witnesses can be ensured by imposing condition on the prisoner that he shall not enter the area where the witnesses are residing etc. However, where the prisoner has absconded and has to be traced by the police and brought back to prison, it is difficult to visualise the conditions which can be imposed on such a prisoner to ensure that the next time he is released he returns back to the prison in time. Despite persons standing as sureties for these prisoners, the records show that the sureties are not always able to ensure that the prisoners surrender back to prison in time. So also reporting to the police station, even at frequent intervals, is not

a sufficient safeguard to ensure that the prisoner will not abscond. Thus, we are of the opinion that in the cases where a prisoner grossly abused the right granted to him the prisoner cannot again claim to be released on furlough as of right. After taking all the factors into consideration, the authorities would well be within their rights to reject such application for furlough.

24. No doubt in some decisions it has been held that availing of furlough leave is a right of the prisoner, but, in our opinion that right is not an indefeasible or an absolute right. This right is subject to other provisions including Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959.

25. As far as furlough is concerned, assuming it is a right which accrues to the prisoner, a prisoner cannot grossly abuse that right and then claim that he is entitled to such right. Once a prisoner has not reported back in time and that too for a long period, he cannot claim a right to be released on furlough specially in cases where a prisoner has not surrendered himself but had to be

arrested and brought back to prison. In cases of prisoners who have been arrested and brought back to prison no fault can be found with the authorities for rejecting the application for furlough.

26. On an application for furlough being received, the authorities may consider whether to grant or refuse furlough after taking into consideration various factors, like, past record, reason for overstay, whether the prisoner was arrested or he had surrendered on his own, period of overstay, possibility of the prisoner again absconding, his conduct in prison in the last few years and other relevant factors. If the prison authorities are satisfied that the overstay was for good and sufficient reasons, for example, the prisoner could not report back in time as there was death in the family or there was earthquake or unprecedented flood or some other sufficient reason, the case of that prisoner for release on furlough can be considered. In cases of late surrender wherein the prisoner has voluntarily surrendered and the delay in surrendering was not unduly long and it was on account of sufficient

cause or reason, such cases can certainly be considered.

27. We clarify that prisoners over staying period of furlough are of two types. Those who over stayed and are required to be brought back by use of police machinery is the first category, and, those who over stayed but surrender on their own accord, is the second category.

28. So far as first category is concerned, they have no right to claim furlough thereafter and authorities would be justified in rejecting their application on that ground.

29. So far as prisoners over staying but surrendering on their own accord they can apply for furlough and the authorities may or may not grant them furlough depending upon the period of over stay and the explanation given by them.

30. So far as the first category is concerned, we have already held that the prisoners have no right to claim furlough and authority would be justified in rejecting their application on that

ground.

31. Regarding second category i.e. prisoners over staying but returning on their own accord, grant of the furlough has been left by us to the discretion of the authorities depending upon the facts and circumstances like the period of over stay, the explanation given and the conduct of the prisoner in jail after his return.

32. As far as the petitioner in Writ Petition No.1624/ 2004 is concerned, he was absconding for more than 13 years. He had to be arrested by he police and brought back to prison. To arrest him the police was required to go to Rajasthan. The reason given by him for not reporting back in time is reflected in para-4 above. We do not find the reason to be plausible looking to the time period involved i.e. over 13 years. Hence in his case no interference is called for.

33. As far as the petitioner in Writ Petition No.375 of 2006 is concerned he was also absconding for almost two years. This prisoner also had to be arrested and brought back to prison by the

police. The petitioner herein did not surrender as claimed by him but in fact he was arrested and brought back. The reason given by him for not reporting for almost two years is that his mother was sick. The nature of the illness is not stated, no medical certificates are produced by the petitioner. In such circumstances we do not find his case to be a genuine one. Had the police not been able to trace him, the petitioner would never have reported back on his own. In his case also we are of the opinion that the authorities have rightly rejected his application on the grounds stated in the order of rejection and no interference is called for.

34. So far as the petitioner in Writ Petition No.3019 of 2005 is concerned, he had overstayed for 56 days. In this case, after 56 days, the petitioner himself surrendered back to the jail authorities. It is the case of the petitioner that he was granted parole leave for 30 days. He applied for extension of further 30 days on account of illness of his mother, which came to be granted. Thereafter, he again made an application alongwith medical certificate for further

extension of parole. However, he did not receive any reply. As he did not receive any reply, after 56 days he surrendered back to prison. It is seen that this petitioner himself surrendered, the reason for overstay given by him appears genuine. Hence, in his case though we are not inclined to set aside the decision rejecting his application for furlough, however hereafter if the petitioner makes an application for furlough, the authorities to decide the same expeditiously keeping the above criteria in view.

35. Writ Petitions disposed of in terms of the above directions. Rule accordingly disposed of.

36. Copy of this Judgment be circulated to all the authorities who decide the furlough applications.

(D.G.DESHPANDE, J.)

(SMT.V.K.TAHILRAMANI,J.)